Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JULIO BANDERAS, M.D., a/k/a
BANDERAS ORTHOPAEDIC CLINIC, and
BANDERAS ORTHOPAEDIC CLINIC, P.C., a/k/a
BANDERAS-CHEVRES ORTHOPAEDIC, P.C.,

Petitioner,

vs.

ALEXANDER DOMAN, M.D.,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an arbitration award and judgment derived from matters outside the terms of an arbitration agreement between parties, and hence beyond the jurisdiction of the arbitrators, is enforceable and in derogation of a civil litigant's right to due process and right to a jury trial as guaranteed by the Fifth and Sixth Amendments to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

The petitioner in this case, defendant and appellant below, is Julio Banderas, M.D., a/k/a Banderas Orthopaedic Clinic and Banderas Orthopaedic Clinic, P.C., a/k/a Banderas-Chevres Orthopaedic, P.C. Respondent in this case, plaintiff and appellee below, is Alexander Doman, M.D.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. THIS COURT SHOULD DETERMINE THAT AN ARBITRATION AWARD AND JUDGMENT DERIVED FROM MATTERS OUTSIDE THE TERMS OF AN ARBITRATION AGREEMENT, AND HENCE BEYOND THE JURISDICTION OF THE ARBITRATORS, IS NOT ENFORCEABLE AND VIOLATES A CIVIL LITIGANT'S RIGHTS TO DUE PROCESS AND RIGHT TO A JURY TRIAL AS GUARANTEED BY THE 5TH, 6TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION 7

A. ARBITRATORS DRAW THEIR JURISDICTIONAL AUTHORITY FROM THE CONTRACT OR STATUTE 7

B. INVOLUNTARILY COMPELLING A PARTY TO ARBITRATION BY CONSIDERING MATTERS OUTSIDE THE SCOPE OF THE PARTIES' CONTRACT OR STATUTE DEPRIVES A PARTY OF DUE PROCESS AND THE RIGHT TO TRIAL BY JURY 8

TABLE OF CONTENTS – Continued

Page

II. THIS CASE PRESENTS IMPORTANT AND RECURRING LEGAL QUESTIONS 11

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

CASES:

Banderas et al. v. Doman, 224 Ga. App. 198, 480 S.E.2d 252 (1997) 1

Bartlett v. Dimension Design, Ltd., 195 Ga. App. 845, 395 S.E.2d 64 (1990) 7

Ekereke v. Obong, 265 Ga. 728, 462 S.E.2d 372 (1995) ..9, 11

First Options of Chicago v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) 6, 7, 9, 12

Goodrich v. Southland Homes Corp., 214 Ga. App. 790, 449 S.E.2d 154 (1994) 7

Greene v. Hundley, 266 Ga. 592, 468 S.E.2d 350 (1996) 7, 8

Mengal Co. v. Nashville Paper Products & Specialty Workers Union, 221 F.2d 644 (6th Cir. 1955)..... 9

People ex rel. Baldwin v. Haws, 37 Barb. 440, 15 Abb. Pr. 115, 24 How Pr. 148 (N.Y. 1862)..... 9

Re Smith, 112 A.2d 625 (Pa. 1955)..... 9

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Const. Amend. V 2

U.S. Const. Amend. VI 2

U.S. Const. Amend. XIV 2

28 U.S.C. § 1257..... 1

O.C.G.A. § 9-9-13(b) 2, 4, 7

PETITION FOR WRIT OF CERTIORARI

Julio C. Banderas, M.D., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Georgia in this case.

OPINIONS BELOW

There is no published opinion of the Georgia Supreme Court denying Banderas's petition for certiorari to the Georgia Court of Appeals. The opinion of the Court of Appeals of Georgia is reported at 224 Ga. App. 198, 480 S.E.2d 252 (1997), and is reprinted beginning at page 1a of the appendix to this petition. There is no published opinion of the arbitration panel or of the trial court which denied Banderas's application to vacate the arbitration award. The award of the arbitration panel is reprinted beginning at page 9a of the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on January 7, 1997. The petition for certiorari filed in the Georgia Supreme Court was denied on April 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The constitutional provisions at issue are the Due Process Clause of the Fifth Amendment to the United States Constitution (U.S. Const. Amend. V) as made applicable to the States by the Fourteenth Amendment to the United States Constitution (U.S. Const. Amend. XIV); and the Sixth Amendment to the United States Constitution (U.S. Const. Amend. VI). The statutory provision involved in this case is O.C.G.A. § 9-9-13(b). These provisions are reprinted in the appendix to this petition beginning at page 22a.

STATEMENT OF THE CASE

This case involves a Fifth, Sixth, and Fourteenth Amendment challenge to Georgia's arbitration procedure in civil cases.

This Court's intervention is needed in order to protect civil litigants from having their property unlawfully taken without due process of law by arbitration awards derived from matters outside the jurisdiction of arbitrators. This Court's intervention is also needed in order to preserve a civil litigant's right to jury trial on matters outside the scope and jurisdiction of arbitration.

* * *

In January 1991, Petitioner, Julio C. Banderas, M.D. (hereinafter referred to as "Banderas") agreed to sell his medical practice to Respondent Alexander Doman, M.D. (hereinafter referred to as "Doman"). Banderas and

Doman entered into an "Asset Purchase Agreement" in connection with this transaction. App. 1. The Asset Purchase Agreement contained an arbitration provision which provided in relevant part as follows:

> Should any dispute arise as to the interpretation, meaning or the intent of this Agreement . . . or should any dispute arise as to any alleged misinterpretation or transgressions by one party to another . . . then such dispute shall be expeditiously decided by arbitration, in Georgia, and the result of such arbitration shall be binding on the parties.

App. 1.[1]

Shortly after entering into the agreement, various disputes arose between the parties. Banderas claimed that Doman failed to pay money owed to Banderas under the agreements. Doman then claimed that Banderas breached various provisions of the agreements by, among other things, improperly exercising self-help remedies following Doman's alleged default. App. 2. Doman demanded that the disputes be arbitrated, but Banderas objected to arbitration. Doman then filed suit for breach of contract

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[1] The Georgia Court of Appeals cited this language of the Agreement, but failed to make any mention of the language restricting what disputes may be decided by arbitration. This omitted language states as follows:

> Any party seeking arbitration shall notify the other party of that party's claims to arbitrate a dispute, in writing within five (5) [days] following the cure period as provided in the *respective instruments* . . . (Emphasis supplied). (This provision of the Asset Purchase Agreement is reprinted in the Appendix to this petition beginning at page 19a).

and asked the trial court to compel the parties to submit to binding arbitration. The trial court entered an order requiring the parties to submit their disputes to binding arbitration. App. 2.

In addition to his claims for breach of contract, Doman raised before the arbitrators new tort claims, specifically, tortious interference with Doman's medical practice. Although Banderas argued that these tort claims were not subject to arbitration, the arbitrators issued a written order finding that they had authority to consider such claims. App. 2. On December 6, 1994, the arbitrators issued a formal decision, finding that Doman owed $155,009 to Banderas, and that Banderas owed $845,602 to Doman. The arbitrators subsequently issued an additional award granting attorney fees and punitive damages to Doman. App. 2.

Banderas moved the trial court to vacate or, in the alternative, modify the arbitrators' award, pursuant to O.C.G.A. § 9-9-13(b). The trial court denied the motion to vacate, but partially granted the motion to modify by setting aside the award of punitive damages. App. 2-3.

Banderas then appealed the trial court's denial of his motion to vacate the award on, among others, the following pertinent grounds. First, Banderas argued that the arbitrators overstepped their authority by considering matters (Doman's tort claims) not contemplated within the arbitration provisions of the Asset Purchase Agreement in derogation of his due process rights. Second, Banderas argued that since the arbitration provision of the Asset Purchase Agreement did not contemplate tort claims, that the arbitrators' consideration of such claims

amounted to forced arbitration, in violation of his right to a jury trial and due process under the United States and Georgia Constitutions. App. 3.

The Georgia Court of Appeals rejected Banderas's arguments. App. 3, and 4. As to the first issue, the court concluded that the arbitration provision in the Asset Purchase Agreement was "not expressly limited to claims of breach of contract, but cover[ed] all disputes arising as to 'the interpretation, meaning or the intent of this Agreement or . . . as to any alleged misinterpretations or transgressions by one party to another.' " App. 3. The court stated that "[w]hether tort claims were intended to be covered by the arbitration provision is a dispute over the 'interpretation, meaning or the intent' of the agreement, a matter which is clearly within the scope of the arbitrators' authority." App. 3-4. The court concluded that "[a]s the arbitrators' finding that the tort claims were covered by the arbitration provision was within the scope of their authority, the arbitrators did not overstep their authority in ruling on such claims." App. 4.

As to the issue of whether the arbitrators' consideration of the tort claims which were not in Doman's complaint amounted to forced arbitration, in violation of Banderas's right to a jury trial and due process under the United States and Georgia Constitutions, the Georgia Court of Appeals concluded that the arbitrators did have the authority to find that the arbitration provision extended to tort claims, and thus rejected Banderas's constitutional argument.

REASONS FOR GRANTING THE WRIT

This case presents an issue vital to the ever increasing dependence on arbitration to relieve the stress of case back log in our court system. The quest for the expeditious administration of civil litigation should not be subordinate to a party's constitutional guarantees of due process and right to jury trial. The Court's intervention is necessary to prevent a litigant's constitutional rights from being sucked up like a black hole by feral arbitration procedures, particularly, as in this case, when matters outside arbitration provisions are forced into the arbitration arena and decided upon.

Furthermore, this Court addressed the issue of whether an arbitrator may decide the arbitrability of a particular matter. *See, First Options of Chicago v. Kaplan,* 514 U.S. 398, 115 S.Ct. 1920, 131 L.Ed. 2d 985 (1995). In the case *sub judice,* the arbitrators were permitted to decide the arbitrability of certain tort claims that were not clearly and unmistakably set forth in the Agreement. *Kaplan,* however, presented a question of arbitrability pursuant to the federal Arbitration Act. The case *sub judice* was arbitrated pursuant to the Arbitration Act of the Georgia Code and does not present a federal statutory question. However, the case *sub judice* poses federal constitutional issues of the arbitrability of particular matters and whether the actions of the arbitrators, as affirmed by the trial court and the Georgia, Court of Appeals, violated Banderas's right to due process in that such matters were not expressly submitted to arbitration and thus precluded him from having such issues submitted to trial by jury.

I. THIS COURT SHOULD DETERMINE THAT AN ARBITRATION AWARD AND JUDGMENT DERIVED FROM MATTERS OUTSIDE THE TERMS OF AN ARBITRATION AGREEMENT, AND HENCE BEYOND THE JURISDICTION OF THE ARBITRATORS, IS NOT ENFORCEABLE AND VIOLATES A CIVIL LITIGANT'S RIGHTS TO DUE PROCESS AND RIGHT TO A JURY TRIAL AS GUARANTEED BY THE 5TH, 6TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. ARBITRATORS DRAW THEIR JURISDICTIONAL AUTHORITY FROM THE CONTRACT OR STATUTE.

Arbitrators draw their jurisdictional authority to decide claims from the contract which provides for arbitration. *See, First Options of Chicago v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Goodrich v. Southland Homes Corp.*, 214 Ga. App. 790, 449 S.E.2d 154 (1994); *Bartlett v. Dimension Design, Ltd.*, 195 Ga. App. 845, 395 S.E.2d 64 (1990). The scope of that jurisdictional authority is not a question for the arbitrators but a question of law for the court. *Id.*

One of the most recent Georgia decisions on this issue of arbitrators' jurisdiction is *Greene v. Hundley*, 266 Ga. 592, 468 S.E.2d 350 (1996). In *Greene*, the Georgia Supreme Court addressed the issue of whether the Georgia Arbitration Code, specifically O.C.G.A. § 9-9-13(b), provided the exclusive grounds for vacating an arbitration award. The court held in the affirmative. O.C.G.A. § 9-9-13(b) sets forth four statutory grounds for vacating an arbitration award. One of those grounds is where the

arbitrators overstep their authority. The court in *Greene* stated that "the Georgia Arbitration Code 'shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate can be enforced.' By its enactment, the Arbitration Code repealed common law arbitration in its entirety, and it must be strictly construed." *Id.* at 594. Then the court in *Greene*, held that "[t]he authority of an arbitrator gives her the 'inherent power to fashion a remedy ***as long as the award draws its essence from the contract or statute.***' " (Emphasis added.) *Id*, at 595.

Unlike *Greene*, the case *sub judice* does not involve the mere misinterpretation of the law or facts, but an overstepping of the arbitrators' authority which is derived from the agreement giving rise to such arbitration. The Asset Purchase Agreement in the case *sub judice* did not grant authority to the arbitrators to decide tort claims. Consequently, the award based on such claims should be vacated because it was derived beyond the jurisdictional authority of the arbitrators, and deprived Banderas his right to due process and right to a jury trial.

B. INVOLUNTARILY COMPELLING A PARTY TO ARBITRATION BY CONSIDERING MATTERS OUTSIDE THE SCOPE OF THE PARTIES' CONTRACT OR STATUTE DEPRIVES A PARTY OF DUE PROCESS AND THE RIGHT TO TRIAL BY JURY.

There exists considerable authority supporting the proposition that a statute or act that compels a party to arbitration unconstitutionally deprives the party of the

right to have such claim tried by a jury. *See, Re Smith,* 112 A.2d 625 (Pa. 1955) (a statute compelling parties to involuntarily arbitrate disputes violates state and federal constitutions); *Mengal Co. v. Nashville Paper Products & Specialty Workers Union,* 221 F.2d 644 (6th Cir. 1955) (compulsory arbitration on issues not agreed upon by the parties for arbitration is invalid); *People ex rel. Baldwin v. Haws,* 37 Barb. 440, 15 Abb. Pr. 115, 24 How Pr. 148 (N.Y. 1862) (compelling a party without his assent to arbitrate a claim which properly should be the subject of an action deprives that party the right to have the matter tried by a jury).

Georgia has taken the same position in that parties can only waive their right to a jury trial by agreement in cases of binding arbitration. *Ekereke v. Obong,* 265 Ga. 728, 462 S.E.2d 372 (1995). In *Ekereke,* the Georgia Supreme Court held that by electing arbitration, parties can agree to waive their constitutional right to a jury trial. However, the court in *Ekereke,* noted that "pre-litigation contractual waivers of the right to a jury trial are not enforceable." *Id,* at 729.

The case *sub judice* is distinguishable from *Ekereke.* The trial court order requiring arbitration provided that only those disputes allowed by the Asset Purchase Agreement be arbitrated. The Asset Purchase Agreement does not allow for tort claims to be resolved by arbitration.

In *Kaplan, supra,* this Court addressed the issue of who decides to submit a particular issue to arbitration. This Court in *Kaplan* noted that such a question turns upon what the parties to the Agreement said about the matter. In other words, did the parties agree to submit the arbitrability question to the arbitrator for a decision?

The Georgia Court of Appeals, in their opinion in the case *sub judice*, pointed out that the agreement allowed for the arbitrators to decide any dispute as to "the interpretation, meaning or the intent of this Agreement. . . ." Consequently, they held that the arbitrators were authorized to decide whether the Agreement contemplated submission of tort claims to arbitration.

However, this Court in *Kaplan, supra*, held that "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is *'clear and unmistakable'* evidence that they did so." (Emphasis supplied). The Georgia Court of Appeals, in the case *sub judice*, broadly applies the language relative to interpretation of the Agreement to include the arbitrability of an issue (i.e. tort claims) that is not so clear and unmistakable. This is especially true considering the Court of Appeals' failure to acknowledge that part of the Agreement that subjects arbitration of a dispute to the following:

> Any party seeking arbitration shall notify the other party of that party's claims to arbitrate a dispute, in writing within five (5) [days] following the cure period as provided in the *respective instruments* . . . (Emphasis supplied). (This provision of the Asset Purchase Agreement is reprinted in the Appendix to this petition beginning at page 19a).

This restriction limits arbitration to those matters which constitute issues under the "instruments" between the parties and for which a demand for arbitration is made within five (5) days after the expiration of "the cure period as provided in [that] instrument." None of the "instruments" involved in this case in any way provide any "cure period" for tortious interference, conversion, or any other tort claim because those instruments do not

govern tort claims. Therefore, the parties did not contemplate arbitration of tort claims.

When the trial court compelled arbitration and then the arbitrators concluded that Doman's tort claims were encompassed by arbitration, contrary to the Asset Purchase Agreement, Banderas was compelled involuntarily to arbitration and deprived from exercising his right to have the tort claims resolved at a jury trial.

Also, contrary to *Ekereke*, Banderas never waived his right to a jury trial relative to the issue of the tort claims. However, assuming *arguendo* that the arbitration clause in the Asset Purchase Agreement between Banderas and Doman constituted pre-litigation waiver of the right to a jury trial, it is not enforceable, pursuant to *Ekereke, supra*, at 729.

II. THIS CASE PRESENTS IMPORTANT AND RECURRING LEGAL QUESTIONS.

This case presents important and recurring questions regarding the jurisdictional authority of arbitrators. A litigant's right to due process and trial by jury must not and should not be subordinate to involuntary expediency as when a party is involuntarily forced to arbitrate an issue not in an arbitration agreement, and when a party does not waive his right to jury trial on such issue. This is what happened in this case.

The need for clear and consistent standards guaranteeing a party's right to jury trial is necessary in the burgeoning push for arbitration over resolving disputes the tried and true way by jury trial.

This case presents an important and novel legal question regarding the arbitrability of particular matters. Under the federal Arbitration Act, this Court in *Kaplan, supra,* held that the reviewing court must look to the instrument giving rise to the arbitration and determine whether such instrument clearly and unmistakably addresses whether an arbitrator can decide what can be arbitrated. However, this case presents a state law arbitration issue within the context of a federal constitutional question of due process and right to jury trial. Banderas respectfully requests this Court to grant his Petition for Writ of Certiorari to address this constitutional question and whether the holding in *Kaplan, supra,* should be extended to state law issues of arbitrability of matters within the context of due process and the right to a jury trial.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted this 17th day of July, 1997.

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APPENDIX

SECOND DIVISION
BEASLEY, BLACKBORN, JJ,
SENIOR APPELLATE JUDGE HAROLD R. BANKE

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

January 7, 1997

In the Court of Appeals of Georgia

A96A1701. BANDERAS et al. v. DOMAN. BL-109

BLACKBURN, Judge.

Julio C. Banderas, M.D. ("Banderas") appeals the trial court's order denying his motion to vacate an arbitration award. Because the arbitrators validly exercised their authority in rendering the award, the trial court's order is affirmed.

In January 1991, Banderas agreed to sell his medical practice to Alexander Doman, M.D. ("Doman"). In connection with this transaction, the parties executed an Asset Purchase Agreement and certain other ancillary agreements. The Asset Purchase Agreement contained an arbitration provision which provided in relevant part as follows: "Should any dispute arise as to the interpretation, meaning or the intent of this Agreement . . . or should any dispute arise as to any alleged misinterpretations or transgressions by one party to another . . . then such dispute shall be expeditiously decided by arbitration, in Georgia, and the result of such arbitration shall be binding on the parties."

Shortly after entering into the agreements, various disputes arose between the parties. Banderas claimed that Doman failed to pay money owed to Banderas under the agreements. Doman claimed that Banders breached various provisions of the agreements by, among other things, improperly exercising self-held remedies following Doman's alleged default. Doman demanded that the disputes be arbitrated, but Banderas refused to agree to arbitration. Doman then filed suit for breach of contract and asked the trial court to compel the parties to submit to binding arbitration. The trial court entered an order requiring the parties to submit their disputes to binding arbitration.

In addition to his claims for breach of contract, Doman raised before the arbitrators claims of tortious interference with Doman's medical practice. Although Banderas argued that these tort claims were not subject to arbitration, the arbitrators issued a written order finding that they had authority to consider such claims. On December 6, 1994, the arbitrators issued a formal decision, finding that Doman owed $155,009 to Banderas, and that Banderas owed $845,602 to Doman. The arbitrators subsequently issued an additional award granting attorney fees and punitive damages to Doman.

Banderas moved the trial court to vacate or, in the alternative, modify the arbitrators' award. The trial court denied the motion to vacate, but partially granted the motion to modify by setting aside the award of punitive

damages. Banderas now appeals the trial court's denial of his motion to vacate the award.[1]

The Georgia Supreme Court has recently held that OCGA § 9-9-13 (b) sets forth the exclusive grounds upon which an arbitration award may be vacated. *Greene v. Hundley,* 266 Ga. 592, 595-596 (468 SE2d 350) (1996). In each of his enumerations of error, Banderas argues that the award should be vacated pursuant to OCGA § 9-9-13 (b) (3) ("[a]n overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made").

1. Banderas asserts that the arbitrators overstepped their authority in considering Doman's tortious interference claims, because such claims were outside the scope of the arbitration agreement. Banderas claims that the parties intended the arbitration provision to extend only to breach of contract claims, and not to tort claims.

Banderas' argument is without merit. The arbitration provision in the Asset Purchase Agreement is not expressly limited to claims of breach of contract, but covers all disputes arising as to "the interpretation, meaning or the intent of this Agreement or . . . as to any alleged misinterpretations or transgressions by one party to another." Whether tort claims were intended to be covered by the arbitration provision is a dispute over the "interpretation, meaning or the intent" of the agreement,

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[1] Doman does not appeal the trial court's order setting aside the award of punitive damages.

a matter which is clearly within the scope of the arbitrators' authority. As the arbitrators' finding that the tort claims were covered by the arbitration provision was within the scope of their authority, the arbitrators did not overstep their authority in ruling on such claims.[2]

2. Banderas also argues that because the arbitration agreement was not intended to cover tort claims, the arbitrators' consideration of such claims amounted to forced arbitration, depriving him of his right to jury trial and due process under the U. S. and Georgia constitutions. However, as discussed in Division 1, supra, the arbitrators found that the arbitration provision did in fact extend to tort claims. As this finding was within the scope of the arbitrators' authority, it will not be disturbed on appeal, and this enumeration is without merit.

3. The arbitrators' award to Doman separately identified several items of damages, including (i) $210,000 in liquidated damages for breach of the restrictive covenant and non-solicitation provisions of the Asset Purchase Agreement, (ii) $37,680 for certain services rendered, and (iii) $500,000 in "general damages for breach of contract and for tortious interference with business and professional practice." Banderas argues that these separate awards are duplicative, and that this constitutes grounds for vacating the award under OCGA § 9-9-13 (b) (3).

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[2] In his brief, Banderas also argues that Doman waived his right to arbitrate the tort claims by not asserting such claims in his original complaint seeking to compel arbitration. However, as this issue was not contained in Banderas' enumerations of error, it will not be considered on appeal. *West v. Nodvin*, 196 Ga. App. 825, 830 (4) (397 SE2d 567) (1990).

"[A] reviewing court is prohibited from weighing the evidence submitted before the arbitrator, regardless of whether the court believes there to be sufficient evidence, or even any evidence, to support the award." *Greene*, supra at 596-597. Therefore, this court cannot examine the record before the arbitrators to determine whether the evidence supported the separate items of damages. The arbitrators' award does not show on its face that these separate items are duplicative, and, accordingly, Banderas' argument is without merit.

Banderas' principal assertion is that the award of $210,000 in liquidated damages precludes the separate award of other items of damages. However, the liquidated damages provision of the Asset Purchase Agreement did not purport to liquidate damages for any and all breaches of the agreements, but was limited to breaches of the restrictive covenant and non-solicitation provisions. The separate award of $37,680 does not appear to have been intended as damages for breach of these provisions, but as compensation for services rendered. Thus, on its face, such damages do not appear to be duplicative of the liquidated damages award.

The $500,000 award for "general damages for breach of contract and for tortious interference with business and professional practice" also does not appear on its face to be duplicative of the other items of damages. The arbitrators found that Banderas breached the Asset Purchase Agreement "in several ways." It appears that the $500,000 in general damages consisted of damages for breach of contract other than those separately provided for in the arbitrators' decision, as well as damages for tortious interference. While it may have been preferable

for the arbitrators to have separately identified damages for each tort and contract claim, they were under no statutory obligation to do so.

Since it does not appear on the face of the arbitrators' award that the separate items of damages were duplicative, we find that the arbitrators did not overstep or imperfectly execute their authority in awarding such damages.[3]

4. Banderas argues that the arbitrators overstepped their authority in awarding liquidated damages to Doman, because the liquidated damages provision of the Asset Purchase Agreement is void as a penalty. However, the construction of the liquidated damages provision was a matter for the arbitrators to determine. See *City of College Park v. Batson-Cook Co.*, 196 Ga. App. 138, 140 (395 SE2d 385) (1990). "The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm

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[3] This court's holding in *Mid-American Elevator Co. v. Gemco Elevator Co.*, 183 Ga. App. 88 (357 SE2d 838) (1987), does not demand a different result. In that case, the court vacated an award pursuant to OCGA § 9-9-13 (b) (3), where the evidence clearly showed, and the appellee admitted, that certain invoices were counted twice by the arbitrator in determining the amount of damages. The court held that, in such case, there was "such an 'imperfect execution of the (arbitration) that a final and definite award upon the subject matter was not made.' " Id. at 89. However, that case was decided before *Greene*, which finally established that a reviewing court is prohibited from weighing the evidence submitted to the arbitrator, regardless of whether there is any evidence to support the award. *Greene*, supra at 596-597.

the award." OCGA § 9-9-13 (d). Furthermore, an arbitrator has the "inherent power to fashion a remedy as long as the award draws its essence from the contract or statute." (Punctuation omitted.) *Greene,* supra at 595.

Additionally, liquidated damages provisions are not per se illegal or unenforceable in Georgia. Rather, they are enforceable if the injury caused by the breach of contract is difficult or impossible to estimate, the parties intend to provide for damages, and the sum stipulated is a reasonable pre-estimate of the probable loss. *Wehunt v. ITT Bus. Communications Corp.*, 183 Ga. App. 560, 561 (2) (359 SE2d 383) (1987); see also OCGA § 13-6-7. In the present case, the arbitrators did not set forth their reasons for finding the liquidated damages provision to be enforceable, and they are not required to do so. *Greene,* supra at 595. This court will not examine the evidence to determine whether the arbitrators correctly applied Georgia law in making an award of liquidated damages. Therefore, this enumeration is without merit.

5. Finally, Banderas argues that the evidence did not support the arbitrators' finding that his actions constituted tortious interference. Because a reviewing court is prohibited for weighing the evidence submitted before the arbitrator, this enumeration is without merit. *Greene,* supra at 596-597.

Judgment affirmed. Beasley, J., and Senior Appellate Judge Harold R. Banke concur.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: April 24, 1997

Stephen E. Boswell
P. O. Box 1507
Jonesboro GA 302371507

Case No. S97C0690

JULIO C. BANDERAS et al. V. ALEXANDER DOMAN

COURT OF APPEALS CASE NO. A96A1701

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

IN ARBITRATION

ALEXANDER DOMAN, M.D.,	§
	§
Plaintiff	§
	§
v.	§
	§
JULIO C. BANDERAS, M.D.,	§
a/k/a BANDERAS ORTHOPAEDIC	§
CLINIC, and BANDERAS	§
ORTHOPAEDIC CLINIC, P.C.,	§
a/k/a BANDERAS-CHEVRES	§
ORTHOPAEDICS, P.C.,	§
	§
Defendants	§

DECISION OF ARBITRATORS

Pursuant to a contract between the two parties, and pursuant to an Order of the Superior Court of Clayton County dated July 28, 1993, the above dispute proceeded to hearing and determination in arbitration. After various preliminary hearings, the matter was heard for evidentiary presentation on October 3, 4, 5, and 6, 1994. The parties have further submitted post-trial briefs and copies of exhibits.

The Arbitrators have met and considered the matter and hereby make the following Answers and Awards in response to the "Questions in Dispute" submitted by the parties jointly, as required by paragraph 45 of the Asset Purchase Agreement. The questions are addressed in the approximate sequence in which it appears decisions must be made concerning the various aspects of this dispute.

1. **QUESTION I. D. (PAGE 40)** "Did Doman fail to pay Banderas for services rendered prior to February 15, 1993 in accordance with the 1992 oral agreement?"

ANSWER: Yes, there was a failure to pay some amount to Dr. Banderas.

2. **QUESTION I. E. (PAGE 41)** "Did Doman cure Doman's failure to pay within 15 days after written notice of such default?"

ANSWER: There was at that time a claimed failure to pay and a dispute over whether there was in fact a failure to pay, and if so, in what amount. This dispute is not found to be an "event of default". Therefore, no "cure" was necessary.

3. **QUESTION I. A. (PAGE 35)** "Did Doman and Banderas orally agree effective February 1992 that Doman would pay to Banderas for services rendered by Banderas to Doman patients after February 1, 1992 an amount equal to Doman's gross collections for such services, less 50% of the office expenses incurred in the operation of the joint office of Doman and Banderas at their joint office?"

ANSWER: Yes.

4. **QUESTION I. B. (PAGE 38)** "Did Doman unilaterally terminate that agreement on February 15, 1993?

ANSWER: No, the oral agreement had expired by its own terms at that time.

5. **QUESTION I. C. (PAGE 38)** "Is Banderas entitled to compensation for services rendered through the period February 1992 through February 15, 1993 calculated in

accordance with the oral 1992 agreement regardless of when collection for services rendered during that period are received by Doman, notwithstanding Doman's termination of the 1992 oral agreement on February 15, 1993?"

ANSWER: Yes.

6. **QUESTION A. 1. F. (PAGE 31)** "Whether Banderas was overpaid sums pursuant to the Provider Agreement?"

ANSWER: No.

7. **QUESTION A. 1. G. (PAGE 32)** "The amount which is due by Banderas to Doman for fees and expenses related to Doman billing accounts receivable of Banderas."

ANSWER: None.

8. **QUESTION B. (PAGE 21)** "Whether Banderas breached the terms of the Asset Purchase Agreement?"

ANSWER: Yes. After undertaking self-help remedies for what he contended to be a "default", Dr. Banderas breached the Agreement in several ways.

9. **QUESTION C. (PAGE 23)** "Whether Banderas breached the terms of the Provider Agreement?"

ANSWER: Yes, specifically in connection with failure or refusal to refer cases to Dr. Doman in the area of knee and shoulder surgery. Dr. Doman should be awarded $30,000 compensatory damages for this item.

10. **QUESTION H. (PAGE 33)** "Whether Banderas is liable to Doman for fees collected for services rendered

during the period from May 1, 1993 through June 30, 1993?"

ANSWER: Yes, Dr. Banderas is liable to Dr. Doman for such fees in the amount of $37,680.

11. **QUESTION F. (PAGE 42)** "Was Banderas released from all obligations to Doman including the restrictive covenant and non-solicitation obligations imposed under the Asset Purchase Agreement as a result of Dr. Doman's default and failure to cure the default within 15 days after written notice?"

ANSWER: The Arbitrators find there was no default, merely a dispute. The Agreement was not ended and the obligations thereunder continued to be in effect.

12. **QUESTION G. (PAGE 44)** "How much is now due to Banderas with respect to collections received by Doman for services rendered by Banderas during the period February 1992 through February 15, 1993?"

ANSWER: $63,276.

13. **QUESTION II. A. (PAGE 47)** "How much money is due Dr. Banderas by Doman for services rendered by Banderas during the period beginning January 11, 1991 and ending January 31, 1992?"

ANSWER: None.

14. **QUESTION A. 1. (PAGE 17)** "Whether Banderas violated the terms of the restrictive covenant?"

ANSWER: Yes.

15. **QUESTION A. 2. (PAGE 18)** "Whether Banderas violated the terms of the non-solicitation agreement?"

ANSWER: Yes.

16. **QUESTION D. (PAGE 25)** "Whether Banderas tortiously, wrongfully, and/or maliciously interfered with the business and medical practice of Doman?"

ANSWER: Yes.

17. **QUESTION E. (PAGE 29)** "Whether Banderas has converted monies and property of Doman?"

ANSWER: Yes, Dr. Banderas is liable to Dr. Doman in the sum of $20,000 for this item.

18. **QUESTION H. (PAGE 45)** "Was Banderas properly charged for following expenses under the terms of the 1992 oral agreement?

(1) Contribution to Profit Sharing and Pension Plan?"

ANSWER: No, Dr. Banderas should recover the sum of $5,717 from Dr. Doman for an overcharge on this item.

"(2) Salary of marketer Jennifer Hill?"

ANSWER: No, Dr. Banderas should recover the sum of $861 on this item.

19. **QUESTION I. (PAGE 46)** "Is Banderas entitled to credit for office and medical supplies taken by Doman when Doman vacated the joint premises?"

ANSWER: No.

20. **QUESTION III. A. (PAGE 47)** "How much is due by each party to the other with respect to collections for services rendered by Banderas during the period from February 1, 1993 to May 2, 1993?"

ANSWER: Dr. Banderas owes Dr. Doman the sum of $47,922 for this item.

21. **QUESTION IV. A. (PAGE 49)** "Did Doman collect and fail to remit to Banderas any sums due on accounts receivable of Banderas existing on January 21, 1991?"

ANSWER: No.

22. **QUESTION B. (PAGE 51)** "Did Banderas properly accelerate the Promissory Note?"

ANSWER: No, the Arbitrators find no event of default to permit such acceleration.

23. **QUESTION C. (PAGE 52)** "Is there interest due on the outstanding balance of the promissory note?"

ANSWER: No.

24. **QUESTION 3. (PAGE 20)** "The amount of liquidated damages which Banderas is liable to pay to Doman?"

ANSWER: $210,000, for breach of the Restrictive Covenant and the Non-Solicitation Agreement.

25. **QUESTION IV. A. (PAGE 48)** "How much is due by Doman to Banderas for overhead and employees salary expenses incurred in the operation of Banderas' office expenses during the period May 13, 1993 through June 30, 1993?"

ANSWER: $8,791.

26. **QUESTION VI. A. (PAGE 50)** "How much is due Banderas by Doman under the January 11, 1991 Promissory Note?"

ANSWER: $76,364.

The Arbitrators find that Dr. Doman is entitled to recover from Dr. Banderas general damages in the sum of $500,000 for breach of contract and tortious interference with business and professional practice.

In summary, the Arbitrators find that Dr. Banderas is entitled to recover the following damages for the following items:

Collections received by Dr. Doman for services rendered by Banderas from February 1992 through February 15, 1993	$63, 276
Improper charges of expenses and contributions to the Profit Sharing and Pension Plan	$5,717
Improper charges for salary of marketer Jennifer Hill	$861
Overhead and salary expenses incurred in the operation of Banderas' office from May 13, 1993 to June 30, 1993	$8,791
Balance due under Promissory Note	$76,364
Total	$155,009

In summary, the Arbitrators find that Dr. Banderas owes to Dr. Doman the following items:

Failure of Dr. Banderas to refer to Dr. Doman surgeries for knees and shoulders	$30,000
For fees collected for services rendered during May 1, 1993 through June 30, 1993	$37,680

For monies and property of Dr. Doman taken over by Dr. Banderas	$20,000
For collections for services rendered by Dr. Banderas from February 1, 1993 through May 2, 1993	$47,922
For liquidated damages for breach of restrictive covenant and non-solicitation agreement	$210,000
For general damages for breach of contract and for tortious interference with businesses and professional practice	$500,000
Total	$845,602

Having found in favor of Dr. Doman, as to actual and general damages, it appears appropriate for the issues of punitive damages to be considered, therefore, pursuant to determinations made at the motions hearing on July 21, 1994, the matter of punitive damages is now permitted to be presented and discovery is reopened to obtain information and data appropriate to the issue of punitive damages. Any such discovery to be completed within 60 days within the date of Decision of Arbitrators.

The issue of award of attorneys fees having been previously reserved for a later determination, the issue of attorneys fees will be heard and decided at the same hearing at which information concerning a claim for punitive damages is made.

Such further evidentiary hearing is now scheduled for the date of February 13-14, 1995.

This 6th day of December, 1994.

/s/ John S. Langford
John S. Langford
Arbitrator

/s/ Irwin W. Stolz, Jr.
Irwin W. Stolz, Jr.
Arbitrator

DISSENT

I respectfully agree in part and disagree in part. I agree with the Answers to Questions 12 (G, p. 44), 18 (H (1) but not (2), p. 45) and 26 (VIA, p. 50). I also agree with the Answer to Question 1 (I.D., p. 40) that Dr. Doman failed to pay Dr. Banderas for services rendered prior to February 15, 1993. However, the failure to pay, to me, resulted in an Event of Default under Paragraph 11(A)(i) of the Security Agreement, not merely a "dispute", and that Event of Default authorized Dr. Doman to exercise his rights under Paragraphs 15(B) and 8(F) of the Security Agreement.

Hence, I respectfully disagree with the Answers to Questions 2 (I.E., p. 41), 8 (B, p. 21), and 11 (F., p. 42), and those Answers which are based thereon.

In fact, I would point out that the Arbitrators have found it necessary avoid a direct answer to Question 2 (I.E., p. 41), above, which Question the parties submitted to us for resolution. Either Dr. Doman did cure the failure

to pay Dr. Banderas, or Dr. Doman did not cure such failure. I would answer the question as put to us: He did not cure the failure, found in answer to Question 1 (I.D., p. 40), above. See also the answer to Question 11 (F, p. 42).

For the foregoing reasons I am unable to agree with the decision of my colleagues.

This 6th day of December, 1994.

/s/ Harold N. Hill, Jr.
Harold N. Hill, Jr.
Arbitrator

ASSET PURCHASE AGREEMENT

45. ARBITRATION:

A. Should any dispute arise as to the interpretation, meaning or the intent of this Agreement or any of the attached Exhibits or any of the attached agreements, or should any dispute arise as to any alleged misrepresentations or transgressions by one party to another and/or the existence of an Event of Default as described in the Security Agreement, attached hereto as Exhibit "F" (other than a payment default under the Note or Lease not involving set-off issues), then such dispute shall be expeditiously decided by arbitration, in Georgia, and the result of such arbitration shall be binding on the parties, subject to the following:

(i) any party seeking arbitration shall notify the other party of that party's desire to arbitrate a dispute, in writing within five (5) following the cure period as provided in the respective instrument; and

(ii) each party shall, within twenty (20) days from the date such notification is received, immediately select an arbitrator, and those two arbitrators shall select a third arbitrator; and

(iii) the question or questions in dispute shall be committed to writing, separately stated and numbered, and signed in triplicate by both parties, each party's proposed answers of contentions shall be signed below the questions, and after the copies are inscribed by the parties at the foot thereof, one copy shall be retained by each of the parties thereto and one

copy shall be furnished to each of the arbitrators; and

(iv) the fees and expenses of the arbitrators shall be borne by the parties hereto in proportion to the number of questions adjudicated adversely to their several contentions or interpretations and the parties agree that the findings of a majority of the arbitrators shall be conclusive and binding on them, their heirs, successors and assigns; and

(v) the arbitrator shall award to the prevailing or substantially prevailing party all reasonable fees connected with such arbitration, including legal and accounting fees; and

(vi) an application may be made to any court having jurisdiction for confirmation of the award and the entry of a judgment or for any other relief with respect to the award as provided by law.

B. Failure by one party to select an arbitrator within the aforementioned time period shall serve as that party's acquiescence and acceptance of the other party's position in this dispute, and such finding shall be conclusive and binding on them, their heirs, successors and assigns.

C. Failure to comply with the award of the arbitrators (unless set aside by a court having jurisdiction) by either party to this Agreement, shall constitute a breach of this Agreement. Furthermore:

(i) If the Purchaser does not comply with the arbitration results, then the Promissory Note (if not previously accelerated) shall accelerate and become immediately due and payable and the Restrictive Covenant and Non-Solicitation, as described in this Agreement, shall become null and void.

(ii) If the Seller does not comply with the arbitration results, then the Seller shall automatically forfeit any further monies due under the term of the Promissory Note and, in addition, the Seller shall discontinue practicing medicine on the Premises and Dr. Banderas shall be subject to the terms of the Restrictive Covenant and Non-Solicitation, as described in this Agreement, which shall remain in full force and effect pursuant to the terms described herein.

(iii) The prevailing party may seek to enforce judgment upon the arbitrator's award rendered together with any other remedy provided herein and by law.

D. If the arbitrator determined that there is not a prevailing or substantially prevailing party, the legal, accounting fees shall be the responsibility of each of the parties in the arbitration, and the actual cost of arbitration, including arbitration fees, will be shared equally.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amend. V.

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. Amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV.

. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 9-9-13(b).

The [arbitration] award shall be vacated on the application of a party who either participated in the arbitration or was served with a demand for arbitration if the court finds that the rights of that party were prejudiced by:

(1) Corruption, fraud, or misconduct in procuring the award;

(2) Partiality of an arbitrator appointed as a neutral;

(3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or

(4) A failure to follow the procedure or this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.